

**OPEN RECORDS AND MEETINGS OPINION  
2002-O-10**

DATE ISSUED:      October 18, 2002

ISSUED TO:        McKenzie School Board

**CITIZEN'S REQUEST FOR OPINION**

On July 23, 2002, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Renae Doan asking whether the McKenzie School Board violated N.D.C.C. § 44-04-20 by failing to give proper notice of a June 25, 2002, meeting and N.D.C.C. § 44-04-19 by holding an executive session.

The request for an opinion was received July 23, 2002, within 30 days of the June 25 meeting in question.

**FACTS PRESENTED**

The McKenzie School Board submitted to the State Board of Public School Education a plan to dissolve the McKenzie School District. The State Board of Public School Education rejected the plan on June 17, 2002. On June 25, 2002, the McKenzie School Board (hereafter, Board) held a special meeting at the Sterling Lions Club to consider its options as the result of the action taken by the State Board of Public School Education.

Notice of the June 25, 2002, meeting was provided on June 21, 2002, to the three members of the Board, the Bismarck Tribune, and the county auditor. The notice was also posted on the McKenzie Bulletin Board, located on Main Street in McKenzie, North Dakota.

The special meeting of the Board began at 10:00 a.m. at the Sterling Lions Club. A motion was made at the special meeting to go into an executive session pursuant to N.D.C.C. § 44-04-19.2 for the purpose of an attorney consultation regarding the options available to the Board after the State Board of Public School Education rejected the Board's proposed dissolution plan. The executive session began at 10:10 a.m. and was attended by the three members of the Board, the county superintendent of schools Karen Kautzmann, who was acting as the McKenzie School District superintendent, the District's business manager, and the District's attorney Gary Thune. The executive session was recorded. At 11:10 a.m. the Board reconvened in open session and adjourned the meeting.

### ISSUES

1. Whether the notice given by the McKenzie School Board for its June 25, 2002, special meeting met the statutory requirements.
2. Whether it was proper for certain people to attend the executive session of the McKenzie School Board other than the members of the Board.
3. Whether the McKenzie School Board had the authority under state law to hold the executive session during its June 25, 2002, special meeting.

### ANALYSES

#### Issue One:

The McKenzie School Board is a public entity. N.D.C.C. § 44-04-17.1(12)(b). See also 2002 N.D. Op. Att'y Gen. O-07 and 1997 N.D. Op. Att'y Gen. O-02. Public notice of all meetings of a public entity must be given in advance unless otherwise provided by law. N.D.C.C. § 44-04-20(1). The notice must include the date, time, and location of the meeting and the topics to be considered. N.D.C.C. § 44-04-20(2). The notice must also include "the general subject matter of any executive session expected to be held during the meeting." N.D.C.C. § 44-04-20(2).

The notice in this case provides:

#### PUBLIC NOTICE

A SPECIAL MEETING OF THE MCKENZIE SCHOOL BOARD WILL BE  
HELD ON TUESDAY, JUNE 25, 2002, AT THE STERLING LIONS CLUB AT  
10:00 AM

THE PURPOSE OF THE MEETING TO REVIEW STATE BOARD ACTION  
ON DISSOLUTION.

(EXECUTIVE SESSION POSSIBLE)

The notice states the date, time and location of the meeting. It also indicates that the sole purpose of the meeting was to review the State Board action on the dissolution, and that an

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executive session may be held. This manner of wording the notice indicates that the subject of any executive session would also be related to the State Board action on the dissolution. See 2000 N.D. Op. Att'y Gen. O-10 (general description of executive session substantially complied with notice requirements). Thus, it is my opinion that, when read as a whole, the notice includes the general subject matter of the executive session.

The notice must be filed with the county auditor, posted at the public entity's main office if one exists, and posted at the location of the meeting on the day of the meeting. N.D.C.C. § 44-04-20(4). In addition, for special or emergency meetings, the Board's official newspaper must be notified. N.D.C.C. § 44-04-20(6).

In this case, notice of the special meeting was filed with the county auditor, and the Board's official newspaper, the Bismarck Tribune, was notified of the meeting. A notice was not posted at the principal office of the McKenzie School District because no main office existed. After the McKenzie school closed in 2002, the McKenzie School District did not maintain an office or office hours. In this case, because an office did not exist, the requirement of posting notice at the main office does not apply. N.D.C.C. § 44-04-20(4). The School District posted all notices on a public bulletin board located on Main Street in McKenzie, North Dakota. The notice for the June 25 meeting was posted on this bulletin board. Representatives of the McKenzie School Board could not verify that the notice was posted at the location of the meeting on the day of the meeting. Thus, the only deficiency in the notice provided is that the notice apparently was not posted at the location of the meeting on the day of the meeting. This office has previously determined that a public entity substantially complied with the notice requirements when it provided all the notice required by law except for posting of the notice at the location of the meeting. See. 1998 N.D. Op. Att'y Gen. O-09. Therefore, it is my opinion that the notice given for the June 25 special meeting of the Board substantially complied with the requirements of N.D.C.C. § 44-04-20.

### Issue Two:

"[A]ny person necessary to carry out or further the purposes of a closed meeting may be admitted [to the closed meeting]." N.D.C.C. § 44-04-17.1(1); see also, 1999 N.D. Op. Att'y Gen. O-01. The executive session was attended by the three board members, the county superintendent of schools Karen Kautzmann, who was acting as the McKenzie School District's superintendent, the District's business manager, and the District's attorney Gary Thune.

The McKenzie School District did not have an acting school superintendent. In such a case, the county superintendent serves as the superintendent for the District. N.D.C.C. § 15.1-11-04. Karen Kautzmann had previous experience with dissolving a school district

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and had been working with the Board and its business manager throughout the dissolution process.

When the State Board of Public School Education denied the dissolution plan for the McKenzie School District, the Board retained attorney Gary Thune. The Board sought his advice about available options, considering the denial of its dissolution plan, and possible legal ramifications and options if the District was not dissolved in timely manner.

Given the subject matter of the executive session and the expertise of the persons attending, it was both reasonable and proper for all of those persons to attend the portion of the meeting which was held in executive session.

### Issue Three:

A public entity may close a portion of an open meeting for the purpose of consulting with its attorney under N.D.C.C. § 44-04-19.1(2). Attorney consultation is defined as “any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney’s advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings.” N.D.C.C. § 44-04-19.1(4).

The Board’s attorney indicated that the closed meeting was held to advise the Board of its options regarding the pending administrative proceeding before the State Board of Public School Education, including appealing the matter to District Court. He explained that the Board had a sense of urgency due to the statutory requirements to dissolve within one year and possible tuition liability of the District for the upcoming school year. This led the Board to explore not only its administrative options, but also the possibility of civil litigation.

The recording of the executive (or closed) session reveals that the executive session of June 25 was limited to the receipt and consideration of the attorney’s advice regarding the legal options of the Board in light of the rejection of their dissolution plan. The attorney discussed the legal strategy involved with each option.

It is my opinion that an executive session for “attorney consultation” was authorized in this situation, and discussion in the executive session was limited to those items authorized by law.

### CONCLUSIONS

1. The notice given by the McKenzie School Board for the June 25, 2002, special meeting met the statutory requirements.
2. It was proper for certain people to attend the executive session of the McKenzie School Board other than the members of the Board.
3. It is my opinion that the McKenzie School Board had the authority to hold an executive session on June 25, 2002, to discuss with its attorney a pending adversarial administrative proceedings and possible litigation.

Wayne Stenehjem  
Attorney General

Assisted by: Mary Kae Kelsch  
Assistant Attorney General

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